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PP v. NADARAJA RAJOO

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
ROHANA YUSUF JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: B-05(S)-66-02-2013 &
CRIMINAL TRIAL NO: 45A-286-09-2011]
5 MARCH 2015

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1) – Section s. 12(2) – Accused pleaded guilty to alternative charge under s. 39A(2) – Prosecution withdrew one charge after accused pleaded guilty to another – Adequacy of sentence – Whether court bound to consider withdrawn charge in imposing sentence – Whether sentence of nine years imprisonment and ten strokes of rotan adequate – Criminal Procedure Code, s. 171A*

D ***CRIMINAL PROCEDURE:*** *Sentence – Adequacy of sentence – Appeal by prosecution – Plea of guilt as mitigating factor – First time offender – Whether quantity of drugs and severity of offence taken into consideration – Whether sentence in trend with other decisions of court – Concept of sentence – Rehabilitation – Whether appellate intervention warranted*

E The respondent faced two charges under the Dangerous Drugs Act 1952 ('DDA'). The first charge was for trafficking in 27.3g of heroin and 5.1g of monoacetylmorphines under s. 39B(1) of the DDA and the second was under s. 12(2) of the DDA for possession of 19.09g of methamphetamine. The
F prosecution tendered an alternative charge under s. 39A(2) for the first charge and offered the second charge to be taken into consideration under s. 171A of the Criminal Procedure Code ('CPC'). The offence under s. 39A(2) carried a sentence of life imprisonment or to a minimum of five years with not less than ten strokes of whipping. Upon a plea of guilt to the alternative charge, the trial judge imposed a sentence of nine years
G imprisonment and ten strokes of whipping on the respondent. In passing sentence, the trial judge stated in his judgment that he had taken into account the second charge in line with s. 171A of the CPC. However, the prosecution submitted that the sentence imposed was manifestly inadequate since life imprisonment was now 30 years and that the sentence of the trial judge was
H not in trend with other decisions of the court. Thus, the trial judge was said to have erred in giving too much emphasis on the mitigating factors and had failed to reflect the application of s. 171A of the CPC in passing the said sentence. Hence, the appeal.

Held (dismissing appeal)
I **Per Rohana Yusuf JCA delivering the judgment of the court:**

(1) The trial judge made his observation that an offence of this nature was to be treated as an offence against the sanctity of the society but at the same time deterrent factors and the personal mitigating factors of the

respondent such as being a first offender should be given due consideration. A fair chance should be given to the respondent since he had shown remorse and pleaded guilty at the first opportunity. The respondent further pleaded to rehabilitate given a chance. As such, there was no error of principle of law applied by the trial judge in meeting out the sentence. (para 4)

(2) There was difficulty in merely comparing the amount of drugs involved *per se* to enhance the sentence imposed by the trial judge. The cases referred would have been decided on their own facts. The court at the appellate stage, was in no position to disturb the discretion exercised by the trial judge who had correctly applied the principal of sentencing. (para 7)

(3) In his grounds of judgment the trial judge had already given consideration to the requirement of s. 171A in passing the sentence. Therefore, in passing the sentence, the trial judge had in the forefront of his mind the second charge against the respondent. However, as the respondent was a first offender, severe imprisonment sentence was not warranted. (paras 8 & 9)

(4) The appellate court will not be readily avail itself to disturb a sentence by the trial judge unless he had taken into account irrelevant consideration. Although the appellate court did not agree with the sentence passed, unless the sentence was outside normal discretionary limits and the imposition involved an error of law and facts, there was no reason for the appellate court to disturb the discretion of the trial judge. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Responden menghadapi dua pertuduhan di bawah Akta Dadah Berbahaya 1952 ('Akta'). Pertuduhan pertama adalah untuk pengedaran 27.3g heroin dan 5.1g monoacetylmorphines di bawah s. 39B(1) Akta dan yang kedua adalah di bawah s. 12(2) Akta untuk milikan 19.09g methamphetamine. Pihak pendakwaan mengemukakan pertuduhan pilihan di bawah s. 39A(2) untuk pertuduhan pertama dan menawarkan tuduhan kedua diambil kira di bawah s. 171A Kanun Tatacara Jenayah ('KTJ'). Kesalahan di bawah s. 39A(2) membawa hukuman penjara seumur hidup atau sekurang-kurangnya lima tahun penjara dan tidak kurang daripada sepuluh kali sebatan. Selepas pengakuan bersalah terhadap pertuduhan pilihan, hakim bicara telah menjatuhkan hukuman sembilan tahun penjara dan sepuluh kali sebatan terhadap responden. Dalam menjatuhkan hukuman, hakim bicara telah menyatakan dalam penghakimannya bahawa beliau telah mengambil kira tuduhan kedua sejajar dengan peruntukan s. 171A KTJ. Walau bagaimanapun, pihak pendakwaan menghujahkan bahawa hukuman yang telah dijatuhkan adalah terlalu ringan dan amat tidak memadai kerana penjara

seumur hidup terkini adalah 30 tahun dan bahawa hukuman hakim bicara tidak mengikut trend semasa dengan keputusan mahkamah yang lain. Oleh itu, hakim bicara dikatakan telah terkhilaf dalam memberi penekanan terlampau kepada faktor-faktor mitigasi dan telah gagal untuk menunjukkan pemakaian s. 171A KTJ dalam menjatuhkan hukuman. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah membuat pemerhatian bahawa kesalahan seperti ini dianggap sebagai suatu kesalahan terhadap kesucian masyarakat tetapi pada masa yang sama faktor-faktor mitigasi peribadi responden seperti pesalah pertama harus diberi pertimbangan yang sewajarnya. Satu peluang yang adil perlu diberikan kepada responden kerana responden telah menunjukkan penyesalan dan mengaku bersalah pada peluang pertama. Responden juga telah memplidkan untuk membaik pulih jika diberikan peluang. Oleh itu, tiada kesilapan prinsip undang-undang yang diguna pakai oleh hakim bicara dalam menjatuhkan hukuman tersebut.

(2) Terdapat kesukaran untuk hanya membandingkan jumlah dadah yang terlibat semata-mata untuk meningkatkan hukuman yang dijatuhkan oleh hakim bicara. Kes-kes yang dirujuk telah diputuskan berdasarkan fakta tersendiri. Mahkamah pada peringkat rayuan, tidak berada dalam kedudukan untuk mengganggu pelaksanaan budi bicara hakim bicara yang telah mengguna pakai prinsip penghukuman dengan betul.

(3) Dalam alasan penghakimannya hakim bicara telah memberi pertimbangan kepada peruntukkan s. 171A dalam menjatuhkan hukuman. Oleh itu, dalam menjatuhkan hukuman, hakim bicara telah meletakkan pada pangkal fikirannya tuduhan kedua terhadap responden. Walau bagaimanapun, oleh kerana responden adalah pesalah pertama, hukuman penjara yang berat adalah tidak wajar.

(4) Mahkamah Rayuan tidak akan dengan mudahnya mengganggu hukuman yang dijatuhkan oleh hakim bicara melainkan jika hakim bicara telah mengambil kira pertimbangan yang tidak relevan. Walaupun Mahkamah Rayuan tidak bersetuju dengan hukuman yang dijatuhkan, kecuali hukuman tersebut di luar had budi bicara lazim dan pengenaannya telah melibatkan kesilapan undang-undang dan fakta, tiada sebab untuk Mahkamah Rayuan mengganggu budi bicara hakim bicara.

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Chan Sit Hoong v. PP [1974] 1 LNS 19 HC ***(refd)***
Moses Dominic v. PP (Case No. A-05(S)-247-10-12) (Unreported) ***(refd)***
PP v. Ariff Saidin (Case No. K-05(S)-261-10-2012) (Unreported) ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 171A
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)

For the appellant - Lailawati Ali; DPP
For the respondent - Rajpal Singh; M/s Rajpal, Firah & Vishnu

Reported by Sandra Gabriel

JUDGMENT

Rohana Yusuf JCA:

[1] The respondent was faced with two charges under the Dangerous Drugs Act 1952 ('DDA'). The first charge was for trafficking in 27.3g of heroin and 5.1g of monoacetylmorphines, under s. 39B(1) of the DDA. The second charge was under s. 12(2) of the same Act for possession of 19.09g of methamphetamine.

[2] As regards the first charge the prosecution tendered an alternative charge under s. 39A(2) of DDA and offered the second charge to be taken into consideration under s. 171A of the Criminal Procedure Code ('CPC'). The respondent pleaded guilty to the alternative charge under s. 39A(2). The offence under s. 39A(2) carries a life sentence or to a minimum of five years with not less than ten strokes of whipping.

[3] The learned High Court Judge at the end of the trial, having taken into account public interest and various mitigating factors imposed a sentence of nine years imprisonment and ten strokes of whipping. In passing the sentence the learned judge had stated in his judgment that he had taken into account the second charge, in line with s. 171A of the CPC.

[4] In his ground of judgment the learned trial judge made his observation that an offence of this nature is to be treated as an offence against the sanctity of the society but at the same time deterrent factors and the personal mitigating factors of the respondent such as he being a first offender should be given due consideration. The learned judge further observed that a fair chance should be given to the respondent since he had shown remorse and pleaded guilty at the first opportunity. The respondent according to the learned judge had further pleaded to rehabilitate himself given a chance. We do not find any error of principle of law applied by the learned judge in meting out the sentence that he did.

[5] Learned DPP however, submitted that the sentence imposed by the learned judge was manifestly inadequate since life imprisonment is now 30 years and the sentence by learned judge was not in trend with other decisions of the court. Learned DPP had illustrated cases of similar nature where the court had imposed sentences in the range of 15 to 18 years

A imprisonment. The learned trial judge was said to have erred in giving too much emphasis on the mitigating factors and had also failed to reflect the application of s. 171A of the CPC in passing the said sentence.

[6] First, we find the learned trial judge in imposing out the sentence which he did, had indeed taken into account relevant factors in his mind and B had not in our view given consideration to irrelevant factors.

[7] On the issue raised by learned DPP, we have analysed the various decisions cited by learned DPP to show the trend of sentencing of cases of similar nature. We noted the cases listed in the written submission were all cases involving the plea of guilty hence would no doubt be good comparison. C In *Moses Dominic v. PP* case No. A-05(S)-247-10-12, there were 133.7g of heroin plus monoacetylmorphines, in *PP v. Ariff Saidin* case No. K-05(S)-261-10-2012 also the amount of drugs were 17.09g heroin plus monoacetylmorphines. We find difficulty in merely comparing the amount of drugs involved *per se* to enhance the sentence imposed by the learned trial D judge. The cases referred to would have been decided on their own facts and at appellate stage we are in no position to disturb the discretion exercised by the leaned trial judge who had correctly applied the principle of sentencing.

[8] The other issue raised by learned DPP is that the sentence does not reflect that s. 171A was given due consideration by the learned trial judge. E We noted that in his judgment the learned trial judge had already given his consideration as to the requirement of s. 171A in passing the sentence as stated clearly in his grounds of judgment. It is clear that in passing the sentence the learned judge had in the forefront of his mind the second charge against the respondent.

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[9] Having weighed the need of society with the interest of the accused the learned trial judge found the sentence of nine years imprisonment plus ten strokes of whipping suffice, to have achieved the objective of sentencing generally. The learned trial judge appeared to have considered that the G sentence he passed may not be severe, but cited the decision in *Chan Sit Hoong v. PP* [1974] 1 LNS 19; [1975] 1 MLJ 261 which states that in case of a first offender, severe imprisonment sentence is not warranted.

[10] In reviewing the sentence we reminded ourselves of the general principle and the restraint placed on the appellate court in interfering with H sentences imposed by the trial judge. The appellate court will not be readily avail itself to disturb a sentence by the trial judge unless he had taken into account irrelevant consideration. Even though we at the appellate stage do not agree with the sentence passed, unless the sentence is outside normal discretionary limits and the imposition involved an error of law or facts, I there is no reason for us to disturb the discretion of the learned judge (see *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83). The principle enunciated in *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976]

2 MLJ 256 is clear that the appellate court would not alter the sentence unless it is manifestly excessive, illegal, or improper sentence having regards to all facts disclosed or the court had erred in principle of sentence.

We did not find any error in this case and therefore dismissed the appeal.